FILE COPY

IN THE

Supreme Court of the United States

No. 72-1549

JOSEPH E. THOMPSON,

Petitioner,

v.

DAVID E. GROSHENS and ELMER LENTZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner, Joseph R. Thompson, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 6, 1973.

OPINIONS BELOW.

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra,* pp. A1-A3. The opinion of the District Court for the Eastern District of Pennsylvania is reported at 342 F. Supp. 516, and appears at Appendix B, *infra,* pp. A5-A14.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 6, 1973. See Appendix A, p. A4, *infra.* The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Where a district court requested and received the entire record taken in connection with the state court order, did the district court and the court of appeals err in failing to treat the defendants' motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure as motions for summary judgment under Rule 56, and to consider and review all materials requested and received by the district court, pursuant to the requirements for an adjudication under Rule 56?

2. Where a civil rights complaint, filed under Section 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983, attacked, inter alia, a state court order on the ground that such order was made in violation of the due process clause of the Fourteenth Amendment of the United States Constitution and therefore void, did a federal court have the right to dismiss the complaint by application of the doctrine of collateral estoppel without first making a judicial determination of the question as to whether or not the state court order was void by reason of its having been made in violation of the due process clause?

3. Where the court of appeals found that there was jurisdiction of the action, did it then have a right to affirm the denial of a motion to convene a three-judge court under 28 U. S. C. §§ 2281 and 2284, by using the doctrine of collateral estoppel to say that plaintiff's complaint did not formally allege a basis for equitable relief, without first making a judicial determination on the merits of the case as to whether or not the state court order was void?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED.

This case involves the Fourteenth Amendment to the Constitution of the United States: the statute providing for a district court of three judges in constitutional cases, 28 U. S. C. §§ 2281 and 2284: Section 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983: the Pennsylvania statute which provides a summary remedy against husbands for support of a wife, Act of June 21, 1939, P. L. 872, § 733, as amended, 18 P. S. § 4733; and Rule 12(b) and Rule 56 of the Federal Rules of Civil Procedure. These are reprinted in pertinent part in Appendix C, pp. A15-A22.

STATEMENT OF THE CASE.

This case originated upon the filing of a civil rights complaint by Joseph R. Thompson ("Thompson") against David E. Groshens, the President Judge of the Court of Common Pleas of Montgomery County, Pennsylvania, and Elmer Lentz, the Court's Chief Domestic Relations Officer. Thompson was the defendant in a support proceeding brought against him by his estranged wife in the Montgomery County Court. Judge Groshens was the trial judge who entered an order against Thompson requiring him to make weekly support payments to his wife.

No constitutional issues were raised in the Court of Common Pleas of Montgomery County, Pennsylvania. However, on appeal to the Superior Court of Pennsylvania, Thompson did question the propriety of the entry of the temporary order and claimed that the support statute, which was the basis for the entry of the temporary order, violated due process. The Superior Court affirmed Judge Groshens per curiam without opinion and this Court denied certiorari (see *Thompson v. Thompson,* 217 Pa. Super. 874, 272 A. 2d 189 (1970), appeal dismissed and *cert. denied,* 405 U. S. 971).

On October 13, 1971, Thompson filed his civil rights complaint in federal court asserting jurisdiction under 28 U. S. C. § 1331, 28 U. S. C. § 1343(3) and (4), 42 U. S. C. § 1983, 28 U. S. C. §§ 2281-2284 and 28 U. S. C. §§ 2201-2202 and sought declaratory and injunctive relief for alleged violations by Judge Groshens and Mr. Lentz of his civil rights in connection with the support proceedings. Thompson also requested that a three-judge court be convened to issue an injunction enjoining the operation and enforcement of the Act of June 21, 1931, P. L. 872, § 733, as amended, 18 P. S. § 4733, hereafter referred to as § 733 of the Penal Code of Pennsylvania.

The complaint avers, *inter alia,* that Judge Groshens under color of § 733 of the Penal Code of Pennsylvania, subjected Thompson to the deprivation of his rights secured by the due process and equal protection clauses of the Fourteenth Amendment by arbitrarily and capriciously entering a final order against him on June 23, 1970, in violation of the settled principles of law and contrary to the undisputed facts. Thompson also alleged in his complaint that § 733 of the Penal Code of Pennsylvania, on its face and as applied, is repugnant to the due process and equal protection clauses of the Fourteenth Amendment because it arbitrarily discriminates against husbands.

Both Judge Groshens and Mr. Lentz filed motions to dismiss the complaint, which were based in part on the asserted failure "to state a claim upon which relief can be granted". Neither respondents pleaded the defense of collateral estoppel in their motions. Before these motions were decided the district court requested and received the entire record of the Montgomery County Court proceeding conducted by Judge Groshens (Letter dated Nov. 11, 1971, to Hon. Edward R. Becker from E. J. O'Halloran together with enclosures).

After oral argument, the district court on April 10, 1972, denied Thompson's motion for a three-judge court and granted the defendants' motions to dismiss the complaint (Appendix B, *infra,* p. A14). On March 6, 1973, the court of appeals affirmed the judgment of the district court (Appendix A, *infra,* p. A4). This petition for a writ followed.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Directly Conflicts With This Court's Interpretation of Rule 12(b) of the Federal Rules of Civil Procedure as Set Forth in *Carter v. Stanton*, 405 U. S. 669.

The last sentence of Rule 12(b) of the Federal Rules of Civil Procedure provides that a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is to be converted into a motion for summary judgment whenever matters outside the pleading are presented to and accepted by the court.

This Court in *Carter v. Stanton*, 405 U. S. 669, held that a district court was required by Rule 12(b) to treat a motion to dismiss as one for summary judgment when matters outside the pleadings were presented and not excluded by the court.

In the instant case, the district court requested and received the entire record taken in connection with the Montgomery County Court proceeding conducted by Judge Groshens. Both the district court and court of appeals were therefore required under *Carter* to treat the motions to dismiss as ones for summary judgment and to consider and review the state court record, pursuant to the requirements for an adjudication under Rule 56. This was not done.

Because of the failure to convert the motions and to consider the state court record, the court below erroneously affirmed the dismissal of the civil rights complaint without first determining whether or not the state court order was void by reason of its being arbitrarily and capriciously entered in violation of the due process clause.

This Court has held that a judgment by a court having jurisdiction over both subject matter and the parties is void where it proceeds in such an arbitrary or improper manner

that its action may be said to constitute a denial of due process. *Windsor v. McVeith*, 93 U. S. 274. Furthermore, a void order is subject to collateral attack. See *Corsby v. Bradstreet Co.*, 312 F. 2d 483 (2d Cir. 1963).

2. The Decision Below Conflicts With This Court's Decision in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U. S. 713.

This Court in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U. S. 713, held that when an application for a three-judge court under 28 U. S. C. §§ 2281, 2284, is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. *Idlewild* also held that when a single judge has erroneously invaded the province of a three-judge court by either granting or withholding relief, the court of appeals has the power to give guidance to the single judge. A court of appeals is precluded from reviewing on the merits a case which should have originally been determined by a court of three judges.

In the instant case, the court of appeals found that the district court erred when it decided that there was no jurisdiction of the action. However, it affirmed the denial of the motion to convene a three-judge court by using the doctrine of collateral estoppel to say that Thompson's complaint did not formally allege a basis for equitable relief. This was incorrect. The decision below was based on the false assumption that challenges to the constitutionality of the Pennsylvania statute were made in the Court of Common Pleas of Montgomery County, Pennsylvania. Furthermore, the defense of collateral estoppel was not pleaded.

See *Blonder-Tongue Lab., Inc. v. University of Illinois Found.*, 402 U. S. 313, which states on page 350 that Res judicata and collateral estoppel are affirmative defenses that must be pleaded.

More importantly, in order to apply the doctrine of collateral estoppel to say that the complaint did not formally allege a basis for equitable relief would require a decision on the merits of the case. This is so, because the court would have to review the record taken in the state court proceeding in order to make a judicial determination as to whether or not the state court order was void.

Under *Idlewild, supra,* a decision on the merits would require the convening of a three-judge court.

3. The Issues Presented Are of Public Importance.

Whenever a state court trial judge ignores the law and the evidence and orders a litigant to pay money to another under the threat of imprisonment for contempt, he is tampering with the fundamental due process rights guaranteed by our federal constitution. Such action is intolerable and cannot be condoned.

Because the district court and the court of appeals did not follow the rules of procedure, they failed to make a judicial determination of the question as to whether or not the state court order was void. The issues presented are therefore important to the general public and to the orderly operation of our federal judicial system. There is no doubt that if federal courts are permitted to disregard the rules, there will be a breakdown in the orderly administration of justice.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 72-1517.

JOSEPH R. THOMPSON,

Appellant,

v.

DAVID F. GROSHENS

AND

ELMER LENTZ.

(D. C. Civil Action No. 71-2455)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued March 6, 1973.

Before GIBBONS, HUNTER, *Circuit Judges* and MUIR, *District Judge.*

Opinion of the Court.

(Filed March 6, 1973)

PER CURIAM

This is an appeal from an order of the district court which denied appellant's motion for the convening of a three-judge district court and dismissed his complaint. The

complaint alleges that Pa. Stat. Ann. tit. 18, § 4733, which provides a summary remedy against husbands for support of a wife and children, is unconstitutional. Proceedings brought pursuant to the Pennsylvania statute are pending in the Montgomery County Court of Common Pleas. In an earlier stage of the Commonwealth nonsupport proceeding the appellant made the same challenges to the constitutionality of the Pennsylvania statute as are here presented. They were rejected in the Common Pleas Court and on appeal to the Pennsylvania Superior Court. The Supreme Court denied certiorari. *See Thompson v. Thompson,* 217 Pa. Super. 874, 272 A. 2d 189 (1970) (per curiam), appeal dismissed and *cert. denied,* 405 U. S. 971 (1972).

While the nonsupport case was pending on appeal the appellant's wife filed a petition in the Court of Common Plea seeking an increase in support payments. Since his constitutional attack had already been rejected by the Court of Common Pleas appellant sought, by this injunction action against the Judge and the Chief Domestic Relations Officer of the Court, to collaterally attack the earlier judgment in a federal court proceeding.

In ruling on a motion to convene a three-judge district court, the inquiries of a single district judge are limited to (1) whether the constitutional challenge to the statute is substantial, and (2) whether the complaint alleges a basis for equitable relief. *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U. S. 713 (1962) (per curiam). In deciding the second question the district court's inquiry is properly at least as probing as in its determination of the first. *Majuri v. United States,* 431 F. 2d 469 (3d Cir.), *cert. denied,* 400 U. S. 943 (1970); *cf. Younger v. Harris,* 401 U. S. 37 (1971). Here the pleadings before the district court established that the appellant had been afforded a full opportunity to litigate his constitutional contentions in the Pennsylvania courts, and had lost. A complaint alleging

that he should be permitted to relitigate those contentions in a federal injunction action does not state a basis for equitable relief. Certainly no injunction could issue enjoining on constitutional grounds the enforcement of a statute in face of a decision, binding on this appellant, that the statute is constitutional. The complaint, therefore, was properly dismissed by a single district court judge.

In view of the foregoing we have no occasion to pass upon the additional grounds for dismissing the complaint set forth in the opinion of the district court, except to note that we do not agree with those parts of that opinion referring to lack of jurisdiction. A dismissal of the action with prejudice would not have been proper if the court lacked jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 72-1517.

JOSEPH R. THOMPSON,
Appellant,

v.

DAVID E. GROSHENS
AND
ELMER LENTZ.
(D. C. Civil Action No. 71-2455)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GIBBONS and HUNTER, *Circuit Judges* and MUIR, *District Judge.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 11, 1972, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

THOMAS F. QUINN,
Clerk.

March 6, 1973.

APPENDIX B.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 71-2455.

JOSEPH R. THOMPSON

v.

DAVID E. GROSHENS, PRESIDENT JUDGE OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY

AND

ELMER LENTZ

Opinion and Order.

BECKER, *J.* April 10, 1972

This is a civil rights action brought against David E. Groshens, the President Judge of the Court of Common Pleas of Montgomery County, Pennsylvania, and Elmer Lentz, the Court's Chief Domestic Relations Officer. The plaintiff, Joseph R. Thompson ("Thompson"), who is a respondent in support proceedings brought against him in that Court by his estranged wife Joan Thompson, seeks declaratory and injunctive relief for alleged violations by the defendants of his civil rights in connection with those proceedings. He also requests that a three-judge court be convened to declare unconstitutional, either facially or as applied, § 733 of the Pennsylvania Penal Code, 18 Purdon

Stat. § 4733, under which the support charges against him were brought.[1] Section 733 is the traditional umbrella for

1. That statute provides:

"If any husband, or father, being within the limits of this Commonwealth, separates himself from his wife or from his children, or from wife and children, (1) his wife or children may file a petition, prepared by the district attorney and joined in and consented to by the husband or father, in the court of quarter sessions of the county in which the wife or children reside or in the county wherein the desertion or failure to maintain took place, setting forth the facts relating to the separation from or neglect to maintain his wife or children, or both, whereupon the court, or any judge thereof in chambers, shall enter an order fixing a time and place for hearing; or (2) any magistrate, upon information made before him under oath or affirmation, by his wife or children, or either of them, or by any person, may issue his warrant for the arrest of the person against whom the information shall have been made, and bind him over, with one sufficient surety, to appear at the court of quarter sessions or other court having jurisdiction, there to answer the said charge of desertion.

The said court, after hearing in a summary proceeding, may order the person against whom complaint has been made or petition filed, being of sufficient ability, to pay such sums as said court shall think reasonable and proper for the comfortable support and maintenance of the said wife or children, or both, and to commit such person to prison, there to remain until he shall comply with such order, or give security, by one or more sureties, to the Commonwealth, and in such sum as the court shall direct for the compliance therewith. But in no instance shall the defendant be required in any county of the first class to give security for compliance, or be imprisoned for failure to give security for compliance, unless and until the court finds on substantial evidence, (1) that the defendant is possessed of property, real or personal, in sufficient amount and in such form, as to enable him to give the required security, and (2) that the defendant is likely to dissipate his assets or flee the jurisdiction. In each instance in which security for compliance is ordered, the court shall enter upon the record the findings on the basis of which the order is made. The court may also issue the appropriate writ of execution against any property, real or personal, belonging to the defendant, and its writ of attachment execution against any money or property to which he may be in any way entitled, whether under what is known as a spendthrift trust or otherwise, which shall not exceed fifty per centum thereof, and shall remain a continuing levy until the order has been paid in full

support actions in Pennsylvania.[2] Jurisdiction is asserted under 28 U. S. C. § 1331, § 1334(3) & (4), 42 U. S. C. § 1983, 28 U. S. C. § 2281-2284 and 28 U. S. C. § 2201-02. The matter comes before us on the motions of Judge Groshens and Mr. Lentz under Rule 12(b) Fed. R. Civ. P. to dismiss the complaint. For a variety of reasons, we grant their motions. We turn first, however, to a review of the facts set forth in the complaint and the other facts of which we may take judicial notice.

On November 6, 1969, following the filing of Mrs. Thompson's complaint, a hearing was held before Judge Groshens, at which Mrs. Thompson testified, and as the result of which Judge Groshens entered a temporary order requiring Thompson to make support payments to Mrs. Thompson of $80 a week. A final hearing was held on February 4, 1970, during which Thompson completed his testimony and defense; pending oral argument and the submission of briefs, Judge Groshens continued the temporary order, which remained in effect until June 23, 1970, when Judge Groshens entered a final order reducing the weekly support payments from $80 to $60 per week. Thompson appealed this final order to the Superior Court of Pennsylvania, No. 1197 October Term 1970. In his appeal, he challenged not only the trial court's finding of his obligation to provide support, but also the constitutionality of § 733, claiming that it violated the due process clause of the Fourteenth Amendment (the precise nature of the constitutional claims are discussed, *infra*). The Superior Court

1. (Cont'd.)

with costs. The person against whom an order is made shall not be entitled to the benefits of any exemption law now in force or hereafter passed."

2. The other viable means of bringing a support action, The Civil Procedural Support Law, 62 Purdon Stat. § 2043.31, *et seq.* is rarely used.

affirmed Judge Groshens per curiam without opinion on December 10, 1970. *Thompson v. Thompson,* 217 Pa. Super. 874 (1970). On January 7, 1971, Thompson filed a timely petition for Allowance of Appeal to the Supreme Court of Pennsylvania, again attacking the constitutionality of the Statute. Miscellaneous Docket No. 18, No. 494-A. This petition was denied on August 16, 1971.

On September 9, 1971, Thompson filed with the Montgomery County Prothonotary, pursuant to 28 U. S. C. § 1257(2), a notice of appeal to the United States Supreme Court. The jurisdictional statement which he subsequently filed with the Supreme Court revealed that he was challenging the Desertion and Nonsupport Statute on the same grounds as he did in the state courts. After the notice of appeal was filed (although before the appeal had been perfected by the filing of the jurisdictional statement) a hearing was scheduled before Judge Groshens on a petition which Mrs. Thompson had previously filed in April 1971 seeking an increase in the support order due to allegedly increased medical expenses. She had sought a hearing on her petition at the time she filed it, but Judge A. Benjamin Scirica of the Montgomery County Court of Common Pleas had ordered the proceedings stayed on the ground that the court had no authority to modify an order from which an appeal had been taken.[3] However, Judge Groshens refused to continue the hearing on Mrs. Thompson's petition which was listed before him on October 19, 1971, and a subpoena was served on Mr. Thompson at the behest of Mr. Lentz with the legend that a bench warrant for his arrest would be issued if he failed to appear.[4]

3. *See* Hodge v. Mc-Bee Co., Inc., 429 Pa. 585 (1968); Commonwealth ex rel. Podvasnik v. Podvasnik, 198 Pa. Super. 107 (1962).

4. At the time Judge Groshens refused applications to continue the hearing, the appeal to the United States Supreme Court had not been perfected. Judge Groshen's unwillingness to continue the hear-

These latter events precipitated the filing of the present lawsuit. In it Thompson has made essentially the same constitutional allegations as he made before the State Supreme Court and the United States Supreme Court. However, Thompson's principal contention, as he presented it to us, was that the holding of a hearing by Judge Groshens would "interfere with the appellate jurisdiction of the United States Supreme Court".

After Judge Groshens was served with the complaint, he referred it to the Attorney General of Pennsylvania for defense.[5] Nevertheless, sua sponte, he continued the scheduled hearing. At a conference of counsel in chambers, we denied Thompson's request for a temporary restraining order. Defendants thereupon filed their motions to dismiss and we have heard argument and have received briefs with respect to same. On March 6, 1972, the United States Supreme Court dismissed the appeal, and treated it as a petition for a writ of certiorari, which it denied.

In addition to alleging that the scheduling of the hearing before Judge Groshens was undermining his right to appeal and interfering with the appellate jurisdiction of the United States Supreme Court, Thompson has framed attacks upon those proceedings before Judge Groshens which resulted in the entry of the final support order which, as we have seen, have been upheld by the Pennsylvania Superior and Supreme Courts. *Inter alia*, Thompson claims to have been deprived of his rights, privileges and immunities secured by the due process and equal protection

4. (Cont'd.)

ing may have been predicated upon this fact (*i.e.*, in a sense, there was no appeal then pending) or upon his disagreement with Judge Scirica's ruling. In view of our disposition of the case, we need not pursue the ramifications of that question.

5. The Attorney General has represented the Judge before us; Mr. Lentz was represented by private counsel.

clauses of the Fourteenth Amendment in violation of 42 U. S. C. § 1983 by:

(1) the arbitrary and capricious entering of the final order contrary to the evidence;

(2) the entering of a temporary order before he (Thompson) had completed his defense; and

(3) the entering of a temporary order which required him to pay over $2,500 before he could appeal.

His claims encompass an attack on the constitutionality of § 733 on the grounds that it:

(1) permits retroactive support orders and gives the court authority to commit a husband to prison if he fails to comply with such an order;

(2) arbitrarily provides different standards for posting security;

(3) arbitrarily eliminates the benefits of any exemption law now in force or hereafter passed; and

(4) arbitrarily discriminates against husbands.[6]

inter alia, Thompson has prayed for the following relief: entry of a temporary restraining order pending the convening of a three-judge court to declare § 733 of the Pennsylvania Penal Code unconstitutional as repugnant to the due process clause of the Fourteenth Amendment, and ultimately the granting of a permanent injunction against its

6. Thompson claims that defendant Lentz violated his civil rights by:

(1) undermining the appellate jurisdiction of the United States Supreme Court by scheduling the hearing;

(2) causing a subpoena to be served on Thompson requiring him to appear or be subject to arrest; and

(3) arbitrarily and capriciously ignoring the order of Judge Scirica.

operation and enforcement; a declaration that the actions of Judge Groshens in entering the temporary and final order and scheduling the hearing were arbitrary and capricious and in violation of Thompson's civil rights; and an order vacating the final support order of June 23, 1970. We shall review the various grounds for defendants' motions to dismiss in the discussion which now follows.

Looking at the matter first from the vantage point that we did before the Supreme Court dismissed the appeal and denied certiorari, we have been cited to no authority and can find none which: (1) holds or infers that the scheduling of a hearing on a requested modification of a support order because of allegedly changed circumstances while an appeal is pending would constitute an interference with the appellate jurisdiction of the United States Supreme Court; or (2) gives this Court jurisdiction to prevent such interference if it existed.[7] In any event, the Supreme Court has now disposed of the appeal, thereby mooting that aspect of Thompson's claim. When that aspect is removed from the case and the balance of Thompson's claim is viewed, it becomes apparent that what he seeks here is collateral review of a case which has been decided by the highest court of a state. This he cannot obtain.

In support of his argument that we do have jurisdiction in the matter, Thompson cites the case of *Wood v. Conneaut Lake,* 386 F. 2d 121 (3d Cir. 1967). This reliance is mis-

7. We will assume arguendo that, under the circumstances of this case, a judge and a court official are not immune from a suit for injunctive relief. This question has not been decided by the Supreme Court, although in *Pierson v. Ray,* 386 U. S. 547 (1967), a suit involving damages, the Court held that the "settled principle" of judicial immunity was not abolished by 42 U. S. C. § 1983. The Court was concerned that judges might be intimidated by the fear of unsatisfied litigants suing them. The argument has been made that the rationale underlying *Pierson* applies equally to suits for injunctions. *See, e.g., McKay v. Nesbitt,* 412 F. 2d 847 (9th Cir. 1969) *aff'g* 285 F. Supp. 498 (D. Alaska 1968).

placed; in fact, we read this case as holding to the contrary.[8] The court there wrote at 125:

> "Failing a prerequisite showing of arbitrary action by the state court, the District Court was without original jurisdiction to entertain appellant's suit. His remedy, if any, was to petition the United States Supreme Court for certiorari. That course was followed without success. Furthermore, no statutory authority exists for the District Court's exercise of appellate jurisdiction under the circumstances of this case." (citations omitted).

The proposition that the jurisdiction of the district court is strictly original, and that it may not act as an appellate tribunal for state court decisions hardly needs recitation. Neither does unsuccessful resort through the route of the state and United States Supreme Courts empower the district court to act. *See Rooker v. Fidelity Trust Co.*, 263 U. S. 413 (1923); *Brown v. Chastain*, 416 F. 2d 1012, *cert. den.* 397 U. S. 951 (1967); *Stafford v. Superior Court of California, Etc.*, 272 F. 2d 407, 409 (9th Cir. 1959);[9] *Eitel v. Faircloth*, 311 F. Supp. 1160 (S. D. Fla. 1970).

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8. Wood was a successful plaintiff in a personal injury case in the Court of Common Pleas of Crawford County, Pennsylvania. The Supreme Court of Pennsylvania, on defendant Conneaut Lake Park, Inc.'s appeal, reversed the judgment of the trial court and entered judgment for the defendant notwithstanding the verdict. Wood then filed suit in the district court, W. D. Pa., seeking to vacate the order of the Pennsylvania Supreme Court claiming that its decision was a violation of the due process clause of the Fourteenth Amendment in that in acting as arbiter of facts it found facts with no support in the record. The district court dismissed finding it had no appellate jurisdiction to review action of the State's highest court and alternatively, if the action was to be treated as an original one, Wood showed no basis for his allegation of deprivation of due process. The Court of Appeals affirmed.

9. In *Stafford*, the Ninth Circuit wrote:

"Constitutional questions inherent in State Court adjudications are to be determined therein and are not subject to collateral review in a federal court under § 1331."

In view of the foregoing observations, it becomes appropriate to ask what, if any, case or controversy is before us with respect to which judicial power can be exercised. To be sure, whatever we do, the case of *Thompson v. Thompson* may well continue on in the Court of Common Pleas of Montgomery County, but what is to be heard is a new episode which certainly is for that court and not for us. While Thompson has sought to invalidate various provisions of § 733, *i.e.*, those dealing with retroactive support, bond, exemption, etc., his allegations have been directed towards that episode of his marital dispute which is now concluded, and which, as we have said, we have no power to collaterally review.[10] We do not construe his complaint (nor could we) as averring that he will be harmed by the allegedly unconstitutional sections of the Act in the next stage of his controversy with his wife, if it eventuates. Thus Thompson has also failed to state a claim cognizable under the Civil Rights Act.

To summarize, there is no jurisdiction in the matter;[11] there is no case or controversy before us to adjudicate; and plaintiff has failed to state a claim upon which relief can be granted.[12]

There are two additional grounds for dismissal in addition to the foregoing. So as not to prolong this opinion unduly, we will state them succinctly.

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10. In fact, Thompson has seemed more concerned with the temporary order which was superseded by the final order.

11. Plaintiff has asserted jurisdiction under the Declaratory Judgment Act, 28 U. S. C. 2201-02. This statute, however, does not confer jurisdiction where it does not otherwise exist. *See Longview Tugboat Co. v. Jameson*, 268 F. 2d 547 (9th Cir. 1955).

12. Defendants' argument that Thompson has not pleaded the requisite jurisdictional amount must however be rejected in view of the recent decision of the Supreme Court in *Lynch v. Household Finance Corp.* filed March 23, 1972. 40 U. S. L. W. ———.

First. Mrs. Thompson is a necessary party who has an interest in the controversy and is so situated that disposition in her absence might, as a practical matter, impair her ability to protect that interest. *See Bendix Aviation Corp. v. Kury,* 88 F. Supp. 243 (E. D. N. Y. 1950); *Hoover Casualty Co. v. Fox,* 102 F. Supp. 214 (N. D. La. 1952). However, she has not been joined as required under Rule 19(a) Fed. R. Civ. Proc.

Second. This is not the type of case in which we would be justified in interfering with a state court proceeding. 28 U. S. C. § 2283. *See, inter alia, Douglas v. City of Jeanette,* 319 U. S. 157 (1943); *Younger v. Harris,* 401 U. S. 37 (1971).

In view of the foregoing analysis, we deny Thompson's motion to convene a three-judge court and will grant the defendants' motions to dismiss. Accordingly, we enter the following Order.

Order.

And Now, this 10th day of April 1972, the motions to dismiss of defendants Judge David E. Groshens, President Judge of the Court of Common Pleas of Montgomery County, and Elmer Lentz, Chief Domestic Relations Officer, are hereby granted, and the above entitled action is dismissed with prejudice.

Edward R. Becker,
Edward R. Becker, *J.*

APPENDIX C.

Amendment XIV.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U. S. C. § 2281.

§ *2281. Injunction against enforcement of State statute; three-judge court required.*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U. S. C. § 2284.

§ *2284. Three-judge district court; composition; procedure.*

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants. Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest prac-

ticable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. As amended June 11, 1960, Pub. L. 86-507, § 1(9), 74 Stat. 201.

42 U. S. C. § 1983.

§ *1983.* Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (RS § 1979.)

From Act Apr. 20, 1871, c 22, § 1, 17 Stat. 13.

18 P. S. § 4733.

If any husband, or father, being within the limits of this Commonwealth, separates himself from his wife or from his children, or from wife and children, without reasonable cause, or neglects to maintain his wife or children, (1) his wife or children may file a petition, prepared by the district attorney and joined in and consented to by the husband or father, in the court of quarter sessions of the county in which the wife or children reside or in the county wherein the desertion or failure to maintain took place, setting forth the facts relating to the separation from or neglect to maintain his wife or children, or both, whereupon the court, or any judge thereof in chambers, shall enter an order fixing a time and place for hearing; or (2) any magistrate, upon information made before him under oath or affirmation, by his wife or children, or either of them, or by any person, may issue his warrant for the arrest of the person against whom the information shall have been made, and bind him over, with one sufficient surety, to appear at the court of quarter sessions or other court having jurisdiction, there to answer the said charge of desertion.

The said court, after hearing in a summary proceeding, may order the person against whom complaint has been made or petition filed, being of sufficient ability, to pay such sum as said court shall think reasonable and proper for the comfortable support and maintenance of the said wife or children, or both, including payment for such support and maintenance from the date of the filing of the complaint, which back payment shall be made at such time or times as the court shall direct, and to commit such person to prison, there to remain until he shall comply with such order, or give security, by one or more sureties, to the Commonwealth, and in such sums as the court shall direct for the

compliance therewith. But in no instance shall the defendant be required in any county of the first class to give security for compliance, or be imprisoned for failure to give security for compliance, unless and until the court finds on substantial evidence, (1) that the defendant is possessed of property, real or personal, in sufficient amount and in such form, as to enable him to give the required security, and (2) that the defendant is likely to dissipate his assets or flee the jurisdiction. In each instance in which security for compliance is ordered, the court shall enter upon the record the findings on the basis of which the order is made. The court may also issue the appropriate writ of execution against any property, real or personal, belonging to the defendant, and its writ of attachment execution against any money or property to which he may be in any way entitled, whether under what is known as a spendthrift trust or otherwise, which shall not exceed fifty per centum thereof, and shall remain continuing levy until the order has been paid in full with costs. The person against whom an order is made shall not be entitled to the benefits of any exemption law now in force or hereafter passed. . . .

Federal Rules of Civil Procedure.
Rule 12(b).

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party

under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing

may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for sum-

mary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may take such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.